Supreme Court of the United States

OCTOBER TERM, 1940.

No. 911.

NORVIN T. HARRIS, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Notice of Motion.

TO THE HONORABLE FRANCIS BIDDLE, SOLICITOR GENERAL OF THE UNITED STATES, FOR THE RESPONDENT:

PLEASE TAKE NOTICE that on the 14th day of April, 1941, at the opening of court on that day a motion for permission to file an additional and supplemental petition for a Writ of Certiorari herein will be submitted for consideration.

Dated, New York, N. Y., April 9th, 1941.

Yours, etc.,

DAVID V. CAHILL,
Solicitor for Petitioner.

Supreme Court of the United States

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ADDITIONAL AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals entered January 18, 1941 in which rehearing was denied March 3, 1941 (Rec. Vol. I, pp. 4823, 4860). The said judgment affirmed the judgment of the District Court for the Eastern District of Louisiana entered on January 2, 1940, in which defendants were convicted and sentenced for alleged uses of the mails in furtherance of a scheme to defraud.

Within the time prescribed for the filing of petitions for writs of certiorari petitioners filed petitions which are pending in this Court, but have not been decided and

it is believed that they have not been submitted to the Court for decision. Leave is now asked on behalf of petitioner, NORVIN T. HARRIS, JR., to file this additional and supplemental petition, presenting in more concise form the reasons for granting the writ and arguments therefor, and additional grounds and arguments not specifically contained in the prior petition. An application is being made simultaneously with the presentation of this petition for its consideration.

Opinions Below.

There was no opinion in the District Court for the Eastern District of Louisiana. The opinion of the Circuit Court of Appeals is reported in 117 Fed. (2nd) 110 (R. Vol. I, p. 4801).

Jurisdiction.

The jurisdiction of this court is invoked under Section 24a of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.).

Questions Presented.

1—Is this type of case within the Mail Fraud Statute and the jurisdiction of the Federal Court?

2—Were the uses of the mails in furtherance of a scheme to defraud?

The questions presented in the original petition are not abandoned, but on the contrary are earnestly urged upon the Court's attention, in addition to those presented here.

Statute Involved.

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C. A. Title 18, Section 338) are as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both. (R. S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Section 215, 35 Stat. 1130.)"

Statement.

A sufficient statement of the facts has been submitted in the petition filed heretofore.

Reasons for Granting Writ.

1—The fraud alleged, as found by the Circuit Court of Appeals, is essentially the bribery of a State official. There is no decision of this Court, or any other Federal court, holding that such an offense constitutes fraud. There are decisions in other Circuits than the Fifth Circuit, which in logical effect conflict with the decision here. The effect of this decision requires a settlement of the law as to the scope of the Statute.

2—The uses of the mails alleged were not in furtherance of any scheme to defraud as heretofore defined and were mainly to conceal an alleged bribery. There is a conflict of authorities on the question whether such uses of the mails as the Government attempted to prove are within the Statute.

ARGUMENT.

I.

This type of case is not within the mail fraud statute or the jurisdiction of the Federal courts.

What has been stated as to the essence of the accusation and proof in the original petition need not be repeated here. A brief reference to the opinion of the Circuit Court of Appeals in its decision affirming the judgment of conviction will suffice for present purposes:

> "Under all the testimony the settlements thus figured seem to us so exorbitant and unreasonable as to indicate fraud or mistake in a civil procedure. Yet we should hesitate to rest a criminal conviction for fraud on it alone" (R. Vol. 8, pp. 4821-4822).

The scheme alleged was to obtain money by false representations. The sole "false representation", which the Government attempted to prove was the representation as to the savings effected for the Levee Board and the consequent calculation as to the fees due petitioners. The elimination of that leaves no false representation in this cause. It becomes purely a question of petitioners' privity to the bribery of a State official. Assuming solely for the sake of this argument a fact, of which there is no evidence, that petitioners knew of and participated in the payment to Waguespack, the sole question presented with respect to the nature of the case is this:

Is a scheme to bribe a State official in connection with his official duty, a scheme to defraud under Section 215?

The cases cited by the Circuit Court of Appeals (R. 4806-4807) in support of its conclusion that such a scheme to bribe is a scheme to defraud, with one exception deal only with the "essential immorality" of a bribery, which for our purpose may be conceded. They hold that contracts obtained by bribery of Federal officials or private fiduciaries are not enforceable by civil suit or that such officers or fiduciaries are liable to account for profits obtained by bribery.

> *Oscanyan* v. *Winchestir Arms Co.*, 103 U. S. 261;
> *Crawford* vs. *United States*, 212 U. S. 183;
> *United States* v. *Carter*, 217 U. S. 286;
> *Pan American Petroleum Co.* v. *United States*, 273 U. S. 456, 500.

The sole exception is the *Crawford* case, which was based not on the mail fraud statute but on Section 5440 Revised Statutes, later Section 37 United States Criminal Code and now Section 88 U. S. C. In that case it was held that an agreement by an official of the United States to receive secretly a portion of the amount paid by the

United States for certain goods on his order was an agreement to defraud the United States under Section 5440.

There is nothing in the decision which suggests any thought that a scheme to bribe a State official is within the Federal jurisdiction under the mail fraud statute. It will be noted that the conspiracy was to defraud the United States. Of the Federal Courts' jurisdiction in such a case there could be no question. It did not involve anything within a state's domain. The whole wide range of "essenial immorality" is not brought within the scope of the statute now under consideration. The purpose of the statute is to prevent schemes of deception from being facilitated by the use of the mails. As one of our circuits has defined such a scheme, it is "a cheat by means of lies" *Bentel* v. *United States,* 13 Fed. (2nd) 327, 329.

It was decided by this Court that not every scheme calculated to injure another or to deprive him of his property wrongfully is within Section 215.

Fasulo v. *United States,* 272 U. S. 620.

In that case this Court held specifically that extortion is not a fraud within this statute.

Norton v. *United States,* 92 Fed. (2nd) 753.

Likewise embezzlement is outside its purview.

United States vs. *Smith,* 29 Fed. (2nd) 926.

In the latter case Judge Woodrough now Circuit Judge of the Eighth Circuit, makes some interesting observations, which are pertinent here, to the effect that an indictment alleging fraud, bases on embezzlement, is a subterfuge to avoid the limitations set by the mail fraud

statute on Federal jurisdiction, and to encroach upon and override the lawful authority of the state. He added (p. 929): "As the great array of mail fraud prosecutions that have been sustained in the federal courts are reviewed, it will be found in every case that there was a definite scheme and letters to execute a scheme, clearly distinguishable from a crime committed and letters to hide and cover it up."

In the case at bar some of the letters were used to advertise and facilitate the refinancing, which in itself was legitimate and free from any taint of fraud. Of the others the utmost that has been said or could be said by the prosecutors is that they may have been used to conceal the alleged bribery. Therefore, we come back to the same question whether bribery of a state official and use of the mails in connection with the bribery are within the Federal jurisdiction under the statute. Undoubtedly hundreds of prosecutions under it are instituted yearly. In so far as this type of case is concerned the question as to the applicability of the statute has never been answered. The Fifth Circuit by its decision here is in conflict with the logic of decisions in other circuits. Only the exercise of this Court's supervisory jurisdiction can resolve the conflict, the doubt as to the bounds of the mail fraud statute, and the resulting confusion.

II.

The uses of the mails were not and could not have been in furtherance of the alleged scheme to defraud.

This subject has already been introduced above in the discussion of the first point, and the proposition follows almost as a corollary from that point.

Most of the letters mailed, specifically those alleged in counts 1, 3, 6, 7 and 8, were to and from petitioners' bankers. The letter mentioned in count 2 is a registered return receipt for the letter of count 1. With respect to these uses of the mails the position of the prosecutors, as stated in their summation, was that the checks were mailed to conceal the bribery (R. Vol. IV, pp. 2573, 2579 and 2580). Unless bribery is fraud, these could not have been uses of the mails in furtherance of a scheme to defraud, and it was error to submit these counts to the jury.

Petitioners were found not guilty on count 4.

The fifth count rested on the mailing of a newspaper notice of bonds that had been called for payment under the refunding plan. The refunding was indisputably honest, legitimate and free from any taint of fraud. The Circuit Court of Appeals finds that the transaction, in so far as the refunding was concerned, was accomplished "with skill and success" * * * "Any fraud about it must lie in the obtaining of the contract or in the settlement under it" (R. Vol VIII, p. 4817). The newspaper notice, therefore, was not in furtherance of the fraud.

Not every letter relating to some phase of the general transaction can be held by reason of that fact alone to be in furtherance of the scheme to defraud.

With respect to the other uses of the mails alleged the language of Judge Woodrough in *United States* v. *Smith, supra,* is pointedly applicable.

Conclusion.

It is urged that in addition to the grounds set forth in the original petition the questions presented here and the reasons shown for granting the writ require the exercise of this Court's supervisory jurisdiction. The statute involved is one of great importance and wide application. In the interest of all concerned in these cases, including of course the Government, the scope of the statute should be authoritatively decided and the limits of Federal jurisdiction clarified.

Respectfully submitted,

DAVID V. CAHILL,
Solicitor for Petitioner.